

NOTICE OF INTENT

Department of Health and Hospitals Board of Medical Examiners

Physician Practice; Complaints and Investigations;
Adjudication (LAC 46:XLV.Chapters 97 and 99)

Notice is hereby given that in accordance with the Louisiana Administrative Procedure Act, R.S. 49:950 et. seq., and pursuant to the authority vested in the Louisiana State Board of Medical Examiners (Board) by the Louisiana Medical Practice Act, R.S. 37:1261-1292, as amended by Act 441 of the 2015 Session of the Louisiana Legislature, the board intends to adopt LAC 46:XLV Chapter 97, which will govern the investigation of complaints against physicians. It also plans to amend various sections of its existing rules relative to adjudication of alleged violations, LAC 46:XLV.Chapter 99. The proposed rules and amendments are set forth below.

Title 46

PROFESSIONAL AND OCCUPATIONAL STANDARDS

Part XLV. Medical Professions Subpart 5. Rules of Procedure

Chapter 97. Complaints and Investigations

§9701. Scope of Chapter

A. The rules of this Chapter govern the board's processing of complaints and investigations relative to the laws governing the practice of medicine by physicians, other state and federal laws to which physicians are subject and the board's rules. These rules are intended to supplement, but not replace, any applicable provision of the Louisiana Administrative Practice Act, R.S. 49:950 et seq. regarding the disciplinary process and procedures. To the extent that any rule of this Chapter is in conflict therewith, the provisions of the Louisiana Administrative Procedure Act shall govern.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9703. Definitions

A. As used in this Chapter, the following terms shall have the meanings specified.

Board—the Louisiana State Board of Medical Examiners, as established in the Louisiana Medical Practice Act, R.S. 37:1261-1292.

Complaint—any information, claim or report of whatsoever kind or nature received or obtained by the board that alleges or may indicate a violation of the law by a licensee.

Jurisdictional—a matter within the board's authority under the law.

Law (or the law)—unless the context clearly indicates other, the Louisiana Medical Practice Act, R.S. 37:1261-1292, other applicable laws

administered by the board and the board's rules, LAC 46:XLV.101 et seq.

Physician or Licensee—an individual who holds a current license or permit duly issued by the board to practice medicine in this state pursuant to R.S. 37:1261-1292.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9705. Complaint Origination

A. Complaints may be initiated by any person or based on information independently developed by the board.

B. The board provides a complaint form on its website, www.lsbme.la.gov, which is to be completed, dated and signed by persons making complaints to the board. Use of the form is preferred but not required.

C. The board shall not take action on an anonymous complaint except when supported by apparently reliable information or evidence provided with the complaint or obtainable from another source.

D. The identity of and communications from a complainant constitute part of a preliminary review or investigative record of the board and shall be maintained in confidence by the board. Confidentiality shall be waived only by written authorization of the complainant, when the complainant will be offered as a witness in a formal administering hearing before the board or as otherwise provided by law.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9707. Complaint Processing

A. The board's staff processes all complaints and conducts all investigations on behalf of the board.

B. Any staff member of the board, except the executive director, may act as the lead investigator on any complaint received by the board regarding a physician or any investigation regarding a physician initiated by the board on its own motion.

C. To obtain evidence of violations of the law or assist in a review or investigation the executive director or a designee authorized by the board is authorized to issue, as necessary or upon request of board staff, such subpoenas as may be required to obtain documents and other information, the appearance of witnesses or sworn testimony.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9709. Preliminary Review

A. Upon receipt of a complaint a preliminary review may be conducted to determine if the

complaint is jurisdictional and whether sufficient cause exists to warrant formal investigation.

B. During a review such action may be initiated and taken as deemed necessary or appropriate and additional information may be obtained to assist in the determination. As part of the preliminary review:

1. documents and information which may be needed to determine if the complaint is jurisdictional and whether sufficient cause exist to warrant formal investigation may be gathered and secured;

2. the complainant may be contacted; and

3. the licensee may be provided the opportunity to respond to the complaint or provide related information; provided, at the time of the first communication from the board to a licensee regarding a complaint the licensee shall be provided:

- a. a brief summary of the complaint or alleged violation or a copy of the complaint if authorization has been provided;

- b. notice that the licensee may, at his own expense, retain legal counsel of his choice to represent his interest; and

- c. such other information as may be deemed appropriate.

C. Any information gathered during the preliminary review will be added to the information maintained on the complaint.

D. Preliminary review of a complaint shall be completed as promptly as possible within one-hundred and eighty days of receipt. However, this period may be increased by the board for satisfactory cause and shall not apply to information received from local, state or federal agencies or officials relative to on-going criminal, civil or administrative investigations or proceedings.

E. Nothing in this Chapter requires that a preliminary review be conducted if the complaint or information clearly indicates the need for formal investigation or emergent action.

F. At the conclusion of a preliminary review a determination shall be made as to whether the complaint is jurisdictional and there is sufficient cause for investigation. If the complaint:

1. is not jurisdictional or there is insufficient cause for investigation, a report and recommendation shall be submitted to the board to close the complaint without investigation. If approved by the board, the complainant and the licensee, if the licensee was notified of the preliminary review, shall be notified of the disposition. If not approved by the board, a formal investigation shall be commenced in accordance with §9711 of these rules. A complaint closed after preliminary review shall not be considered an investigation by the board and need not be reported as such by a licensee on subsequent renewal applications to the board.

2. is jurisdictional and there is sufficient cause for investigation, a report and recommendation shall

be submitted to the board to commence a formal investigation. The report shall include:

- a. a brief summary of the complaint or alleged violation;

- b. a statement of the possible violations of the law involved; and

- c. a summary of the licensee's biographical, licensure and disciplinary history on file with the board.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9711. Formal Investigation

A. If the board determines by a majority vote of the members present and voting at a board meeting that a complaint warrants investigation it shall instruct board staff to initiate a formal investigation. If the board determines that a complaint does not warrant investigation it shall be closed pursuant to §9709F.1. of this Chapter.

B. Written notice of the investigation including a brief summary of the facts constituting the alleged violation shall be provided to the licensee no later than five business days after the board's formal investigation is initiated by registered, return-receipt-requested mail, as well as by regular first class mail, or by personal delivery or other means, at the most current address for the licensee reflected in the official records of the board. Such notice shall also include the information set forth in §9709B.3.a.-c. of this Chapter.

C. Once a formal investigation is initiated by the board, an investigation shall be undertaken to determine whether or not there is sufficient information and evidence to indicate that a violation of the law has occurred.

D. Past complaints and investigations of a licensee may be utilized in a current investigation for the purpose of determining if there is a pattern of practice or continuing or recurring conduct that fails to satisfy the prevailing and usually accepted standards of medical practice in this state on the part of the licensee.

E. If the complaint giving rise to the formal investigation involves medical incompetency, as part of the investigation a request may be made, or the board may order in a manner prescribed by §365D of these rules, the licensee to undergo a competency evaluation at a third-party evaluation center approved by the board.

F. If the investigation does not provide sufficient information and evidence to indicate that a violation of the law has occurred, a report and recommendation shall be made to the board that the investigation be closed without further action. If the board approves the recommendation, the complainant and the licensee shall be provided written notification of the disposition. If the recommendation is not approved,

such further investigation or other action shall be taken as may be necessary or appropriate.

G. If the investigation provides sufficient information and evidence to indicate that a violation of the law has occurred, an administrative complaint may be filed with the board, pursuant to Chapter 99 of these rules, provided one or more of the following conditions exist:

1. a draft administrative complaint, in the form and content specified in §9903B of these rules, has been mailed or provided to the licensee accompanied by a letter providing a reasonable opportunity for a conference to show compliance with all lawful requirements for the retention of the license without restriction, or to show that the complaint is unfounded as contemplated by R.S. 49:961(C); however, the licensee fails to respond to the complaint and letter, waives the opportunity, or the response does not satisfactorily demonstrate lawful compliance or that the complaint is unfounded;

2. informal disposition is attempted but fails to resolve all of the issues and the procedures specified in §9711G.1 of this Section have been provided with the same result described;

3. emergency action is required to pursuant to §9931.

H. Formal investigations shall be completed within thirty-six months after initiated by the board. However, this period may be increased by the board for satisfactory cause and no complaint shall be dismissed solely because a formal investigation was not completed within this period. This period shall also not apply to any investigation pending on July 1, 2015.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9713. Informal Settlements and Consent Orders

A. The board may, before, during, or following an investigation, or after filing an administrative complaint, dispose of any complaint through informal disposition.

B. Informal dispositions may take the form of any disposition recognized by R.S. 49:955D, or any other form of agreement which adequately addresses the complaint or matter under review or investigation; provided, however, that such dispositions are considered by the board only upon the recommendation of the board's lead investigator with respect to the investigation and all such dispositions require approval by a majority vote of the board members present and voting at a board meeting.

C. Informal dispositions may be either non-disciplinary or disciplinary:

1. Non-disciplinary dispositions consist of correspondence, an informal conference and a letter of concern. These dispositions shall not constitute disciplinary action, are not a public record of the board

and are not reported and distributed in the same manner as final decisions of the board.

2. Disciplinary dispositions consist of consent orders, and other orders and agreements, and stipulations for voluntary surrender of a license. These dispositions shall constitute disciplinary action, shall be a public record of the board, and are reported and distributed in the same manner as final decisions of the board.

D. Any matter may be referred to the board for administrative hearing without first offering an informal disposition.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

Chapter 99. Adjudication

§9907. Response to Complaint; Notice of Representation

A. ...

B. Any respondent may be represented in an adjudication proceeding before the board by an attorney at law duly admitted to practice in this state. Upon receipt of service of a complaint pursuant to this Chapter, or thereafter, a respondent who is represented by legal counsel with respect to the proceeding shall personally or through such counsel, give written notice to the board of the name, address, and telephone number of such counsel. Following receipt of proper notice of representation, all further notices, complaints, subpoenas, orders, or other process related to the proceeding shall be served on respondent through his or her designated counsel of record.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:507 (June 1990), amended LR 41:

§9915. Disposition of Prehearing Motions

A. - B. ...

C. The president of the board or presiding officer of the hearing panel, as the case may be, may delegate the task of ruling on prehearing motions to the board's independent legal counsel appointed pursuant to §9921D, who is independent of complaint counsel and who has not participated in the investigation or prosecution of the case.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:508 (June 1990), amended, LR 41:

§9916. Discovery

A. After filing and notice of an administrative complaint has been served pursuant to §9905 of this Chapter:

1. the parties or their respective counsel shall, within the time frames established by the prehearing

conference order, provide the other with a list of all witnesses and copies of all exhibits that may be offered as evidence at the adjudication hearing. Respondent shall also be provided a copy of any written or recorded statement he may have provided to the board and any exculpatory material the board may possess concerning the respondent;

2. subpoenas and subpoenas duces tecum may be requested pursuant to §9917 of these rules and discovery may be conducted in accordance with the Louisiana Administrative Procedure Act.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9919. Prehearing Conference

A. In any case of adjudication noticed and docketed for hearing a prehearing conference shall be held among the parties or their respective counsel, together with the board's independent counsel appointed pursuant to §9921.D hereof, for the purpose of simplifying the issues for hearing and promoting stipulations as to facts and proposed evidentiary offerings which will not be disputed at hearing.

B. Following such prehearing conference the parties shall, and without such conference the parties may by agreement, agree in writing on a prehearing stipulation or order which shall include:

1. - 5. ...

6. dates for exchanging and supplementing lists of witnesses and copies of exhibits that may be offered at the hearing and discovery.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:509 (June 1990), amended, LR 41:

§9920. Recusal

A. Any board member who, because of bias or interest, is unable to assure a fair hearing shall be recused from that particular proceeding. The reasons for the recusal shall made part of the record. Should the majority of the board members be recused for a particular proceeding, the governor shall be requested to appoint a sufficient number of pro tem members to obtain a quorum for the proceeding.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1261-1292 and 37:1270(A)(5).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 41:

§9921. Conduct of Hearing; Record; Order

A. - F. ...

G. The order of proceedings in an adjudication hearing is as follows but may be altered at the discretion of the presiding officer or by agreement of the parties:

1. complaint counsel makes an opening statement of what he intends to prove, and what action is sought from the board;

2. respondent or his counsel makes an opening statement, explaining why he believes that the charges against respondent are not legally founded;

3. complaint counsel presents the evidence against the respondent;

4. respondent or his counsel cross examines;

5. respondent or his counsel presents evidence;

6. complaint counsel cross examines;

7. complaint counsel rebuts the respondent's evidence; and

8. each party makes closing statements. The complaint counsel makes the initial closing statement and the final statement.

H. The board may impose reasonable time limits on the parties provided that such will not unduly prejudice the rights of the parties.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:509 (June 1990), amended, LR 41:

§9923. Evidence; Burden of Proof

A. - E. ...

F. Burden of Proof. Any final decision of the board shall be supported by a preponderance of the evidence presented during the administrative hearing.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:509 (June 1990), amended, LR 41:

§9925. Informal Disposition

Repealed.

AUTHORITY NOTE: Promulgated in accordance with R.S. 37:1270(B).

HISTORICAL NOTE: Promulgated by the Department of Health and Hospitals, Board of Medical Examiners, LR 16:510 (June 1990), repealed, LR 41:

Family Impact Statement

In compliance with Act 1183 of the 1999 Regular Session of the Louisiana Legislature, the impact of the proposed rules and amendments on the family has been considered. It is not anticipated that the proposed rules and amendments will have any impact on family, formation, stability or autonomy, as described in R.S. 49:972.

Poverty Impact Statement

In compliance with Act 854 of the 2012 Regular Session of the Louisiana Legislature, the impact of the proposed rules and amendments on those that may be living at or below one hundred percent of the federal poverty line has been considered. It is not anticipated that the proposed rules and amendments will have any impact on child, individual or family poverty in relation to individual or community asset development, as described in R.S. 49:973.

Provider Impact Statement

In compliance with HCR 170 of the 2014 Regular Session of the Louisiana Legislature, the impact of the proposed rules and amendments on organizations that provide services for individuals with development disabilities has been considered. It is not anticipated that the proposed rules and amendments will have any impact on the staffing, costs or overall ability of such organizations to provide the same level of services, as described in HCR 170.

Public Comments

Interested persons may submit written data, views, arguments, information or comments on the proposed rules and amendments to Rita Arceneaux, Confidential Executive Assistant, Louisiana State Board of Medical Examiners, 630 Camp Street, New Orleans, LA, 70130, (504) 568-6820, Ex. 242. She is responsible for responding to inquiries. Written comments will be accepted until 4 p.m., October 21, 2015. If a public hearing is requested to provide data, views, arguments, information or comments orally in accordance with the Louisiana Administrative Procedure Act, the hearing will be held on October 26, 2015, at 2:30 p.m. at the office of the Louisiana State Board of Medical Examiners, 630 Camp Street, New Orleans, LA 70130. Any person wishing to attend should call to confirm that a hearing is being held.

Public Hearing

A request pursuant to R.S. 49:953(A)(2) for a public hearing must be made in writing and received by the Board within 20 days of the date of this notice.

Cecilia Mouton, M.D.
Executive Director

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULES

RULE TITLE: Physician Practice; Complaints and Investigations; Adjudication

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

In conformity with Act 441 of the 2015 Session of the Louisiana Legislature, which amended the Louisiana Medical Practice Act by, among other items, enacting R.S. 37:1285.2, the Board of Medical Examiners proposes to adopt rules governing investigations and complaints (LAC 46:XLV Chapter 97), amend certain sections of its existing rules on adjudication (LAC 46:XLV Chapter 99) and make other changes consistent with the new law. All substantive changes with a fiscal impact are explained below.

The proposed rule will result in an estimated cost of \$422,429 in FY 16 and recurring costs of approximately \$340,000 beginning in FY 17. Estimated costs are attributable to: the need to hire a physician consultant separate from the physician executive director to conduct investigations (\$246,901 – base salary \$175,000 per year + \$64,750 retirement for state employees +

\$4,613 group insurance per year + \$2,538 Medicare contribution = \$246,901 salary package) and a compliance investigator to monitor investigations, provide notice and insure compliance with other procedural requirements (\$74,240 – base salary \$50,000 per year + \$18,500 retirement for state employees + \$5,015 group insurance per year + \$725 Medicare contribution = \$74,240 salary package). The Board will also incur one-time costs to acquire a new software system to properly track and monitor investigations and complaints (\$100,000). Publication costs associated with notice (\$681) and promulgation (\$607) of the proposed rules and amendments are estimated at a combined total of \$1,288 in FY 16, for a total fiscal impact in FY 16 of \$422,429 (\$246,901 + \$74,240 + \$100,000 + \$1,288 = \$422,429). Recurring costs in FY 17 are estimated at \$339,601 (physician consultant \$256,592 + compliance investigator \$77,009 + \$6,000 software maintenance) and in FY 18 will be \$352,561 (physician consultant \$266,672 + compliance investigator \$79,889 + \$6,000 software maintenance). Out year estimates assume a 4% annual increase in personal services. Other than the initial and rule publication costs during the year FY 16, and recurring costs in following years, it is not anticipated that the proposed rules and amendments will have further impact on the Board or any other state or local governmental unit, inclusive of adjustments in workload and paperwork requirements.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

There is no anticipated effect on the revenue collections of the Board of Medical Examiners or any state or local governmental unit.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL GROUPS (Summary)

It is not anticipated that the proposed rules and amendments will have a material effect on costs, paperwork or workload of physicians, nor on receipts and/or income of licensees or non-governmental groups.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

It is not anticipated that the proposed rules and rule amendments will have any impact on competition or employment in either the public or private sector.

Cecilia Mouton, M.D.
Executive Director
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Evan Brasseaux
Staff Director
Legislative Fiscal Office